BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD JOSEPH GRONNIGER Claimant	)	
VS.	)	
THE BOEING COMPANY Respondent	)	Docket Nos. 1,017,841 and 1,017,842
AND	)	
INDEMNITY INS. CO. OF NORTH AMERICA, AMERICAN MANUFACTURERS MUTUAL INS. CO., and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carriers (respondent) requested review of the November 29, 2007, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on February 15, 2008. Randy S. Stalcup, of Wichita, Kansas, appeared for claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carriers.

On July 9, 2004, claimant filed two Applications for Hearing with the Division of Workers Compensation. The first application alleged injuries to the "neck, back, shoulders, and both arms" from "repetitive use of back and shoulders and lifting" on May 3, 2000, and each and every day thereafter. That application was assigned Docket No. 1,017,841. The second Application for Hearing alleged injuries to the "hand, bilateral carpal tunnel syndrome" from repetitive use on October 1, 2002, and each and every day thereafter. That

application was assigned Docket No. 1,017,842. The ALJ consolidated these two docketed claims for trial and award.[1]

The ALJ found that claimant was injured out of and in the course of his employment with respondent on March 3, 2000[2], and each and every working day through October 1, 2002. The ALJ combined all claimant's injuries in both docketed claims and issued a single award. He found that claimant was entitled to a functional impairment of 11 percent to the body as a whole from October 1, 2002, until the day of his layoff of June 17, 2005. The ALJ further concluded that claimant made a bona fide effort to find employment after his layoff but had been unsuccessful. Since claimant was no longer earning within 90 percent of his former salary, the ALJ found he was eligible for a work disability after the date of his layoff. The ALJ found claimant had a 100 percent wage loss and a 28 percent task loss and computed his work disability to be 64 percent to the body as a whole after June 17, 2005.

The Board has considered the record and adopted the stipulations listed in the Award. The Board notes, however, that the stipulations set out in the Award show alleged dates of accident of March 3, 2000, and December 1, 2002. As noted above, the Application for Hearing in Docket No. 1,017,841 sets out an alleged date of accident of May 3, 2000, and each and every day thereafter. The Application for Hearing in Docket No. 1,017,842 sets out an alleged date of accident of October 1, 2002, and each and every day thereafter. It is also noted that at the regular hearing held October 22, 2007, the parties stipulated to an average weekly wage of $1,031.40 as to both docketed claims,[3] whereas the ALJ's Award of November 29, 2007, sets out average weekly wage as an issue to be decided.[4] Also, at the time of the October 22, 2007, regular hearing, respondent denied notice in Docket No. 1,017,841. The November 29, 2007, Award, in its recitation of stipulations, states that respondent admitted notice. Respondent stipulated to notice in Docket No. 1,017,842 in the regular hearing held January 8, 2007.[5] Also, the

---

[1] Whether these two docketed claims were consolidated was an issue when these cases were before the Board previously following an appeal from Judge Clark's previous Award entered on May 19, 2007. By Order of September 6, 2007, the Board set aside the ALJ's Award and remanded these claims to the ALJ for reconsideration and resolution.

[2] This appears to be an inadvertent misstatement, as the Application for Hearing sets out a date of accident in Docket No. 1,017,841 as May 3, 2000, and each and every day thereafter.

[3] It does not appear that this stipulated gross average weekly wage includes the value of any fringe benefits claimant received from respondent.

[4] On appeal, neither party has raised average weekly wage as an issue. Claimant's wage entitled him to the maximum compensation benefit rate.

[5] Respondent does not argue notice as an issue in this appeal.

Award's listing of stipulations shows Broadshire to be the insurance carrier for respondent, when the record shows that Insurance Company of the State of Pennsylvania, American Manufacturers Mutual Insurance Company, and Indemnity Insurance of North America had the workers compensation coverage for respondent during the period of time encompassing the alleged dates of accident. Insurance Company for the State of Pennsylvania was respondent's insurance carrier on May 3, 2000, and American Manufacturers Mutual Insurance Company had the coverage on October 1, 2002. Further, the Division's records show that Indemnity Insurance Company of North America had the workers compensation insurance coverage for respondent for the period from January 1, 2003, through June 16, 2005, which was claimant's last day worked for respondent.

Finally, the Award's recitation of the record fails to include the March 26, 2007, deposition transcript of Steve Benjamin, although the ALJ alludes to this deposition in the body of the Award.

ISSUES

Respondent argues that these cases involve two separate workers compensation claims, and, therefore, the ALJ erred by not entering separate awards in each of the two docketed claims. Respondent notes that in Docket No. 1,017,841, claimant alleged injuries to his neck, back, shoulders and both arms from May 3, 2000, and continuing each and every day thereafter. Respondent asserts in regard to Docket No. 1,017,841, the ALJ found that claimant was injured out of and in the course of his employment on March 3, 2000,[6] and each and every working day through October 1, 2002. However, respondent contends the ALJ did not make a finding that claimant suffered any permanent partial impairment for any of the injuries that occurred before October 1, 2002. Respondent argues there is no evidence that claimant continued to sustain an injury to his neck each and every day worked after May 3, 2000, but, instead, claimant continued to work his regular job without restrictions until his layoff. Accordingly, respondent requests that the Board affirm the finding of the ALJ that claimant suffered no permanent partial impairment as a result of his injury of May 3, 2000, as claimed in Docket No. 1,017,841.

Respondent argues that the ALJ erred in finding that claimant suffered a neck injury in Docket No. 1,017,842. In regard to Docket No. 1,017,842, claimant complained of injuries to his bilateral upper extremities, but there was no evidence of a new neck injury nor any evidence of a continuing trauma to his neck. Respondent requests, therefore, that

[6] Although the respondent's brief sets out a date of accident of March 3, 2000, the Application for Hearing, the record, and the body of the award shows and alleged date of accident of May 3, 2000, and each and every day thereafter. The ALJ's list of stipulations shows a date of accident of March 3, 2000. However, as stated previously, this appears to be a misstatement of the record or a typographical error.

in regard to Docket No. 1,107,842, the Board reverse the decision of the ALJ and find that claimant failed to prove he suffered permanent partial impairment to the body as a whole and, instead, is only eligible to compensation for scheduled injuries to his upper extremities.

Claimant argues that the ALJ was correct to combine all of claimant's injuries together for one award. It is claimant's position that the two docketed claims were tried together and should be treated as one series of accidents. Claimant contends that the opinions of Dr. Murati are the most credible and should be adopted as to the claimant's percentage of functional impairment and task loss, but the ALJ's Award should otherwise be affirmed.

The issues for the Board's review are:

(1) Are these two separate claims or should they be treated as one series of accidents?

(2) In regard to Docket No. 1,017,841, did claimant prove that he suffered permanent partial impairment as a result of repetitive injuries he suffered to his neck, back, shoulders and both arms on May 3, 2000, and each and every day he worked thereafter?

(3) In regard to the injuries alleged in Docket No. 1,017,842, did claimant prove he suffered permanent partial impairment to his body as a whole for the injuries claimed to his upper extremities, or is he limited to a claim for scheduled injuries to his upper extremities?

(4) Is claimant eligible for work disability in either or both docketed claims?

FINDINGS OF FACT

Claimant started working for respondent on June 1, 1978. He worked in the shop as a crater 1. He moved up to a grade 3, but said his job was basically the same. Later he was moved up to a grade 5, at which time he started doing blueprint boxes. That move occurred in the 1990's. At some point, his job title was changed to shipping/distribution facilitator.

On May 3, 2000, claimant was lifting some angle iron when he felt something snap in his neck. He reported the injury to respondent and received medical treatment from Dr. John Estivo. He complained to Dr. Estivo of pain in his neck and shoulders. He did not miss any work as a result of his injuries. He testified he was given an easier job at respondent after the injury. On cross-examination, however, he stated he returned to his regular job. He could not remember whether he was given restrictions after this injury.

On October 1, 2002, claimant started feeling numbness in his hands. The numbness worked up into his arms and shoulders. Respondent referred claimant to Dr. J. Mark Melhorn, who performed surgery on his right hand and elbow on April 22, 2003. He may have missed a half day of work following the surgery.

Claimant returned to his regular job the day after the surgery, but again claimant could not remember if he had any restrictions. However, claimant testified that he was given an easier job of a water strider. He stated that he performed one area of work all the time he worked for respondent but that after the 2002 incident, his job tasks changed.

The work claimant performed at respondent in the 1990's until his separation from respondent in June 2005 involved extensive use of his upper extremities. Claimant's last day worked at respondent was June 16, 2005, after which he was laid off. He has attempted to find employment but remains unemployed. He had not received an offer of employment from June 2005 to the date of the January 8, 2007, regular hearing.

Claimant describes his current symptoms as headaches every day, pain and crackling in his neck, and pain in his shoulders and wrists. The pain in his shoulders is constant. Cold weather and certain activities, such as fishing, make it worse. Yard work and walking make it worse. He has constant pain when he turns and moves. He has an aching pain and weakness in his arms from his fingers through the elbow.

Dr. Estivo, a board certified orthopedic surgeon, treated claimant beginning January 26, 2001, for injuries he reportedly sustained on May 3, 2000. Claimant told Dr. Estivo that he injured his shoulders and neck while lifting angle iron. Dr. Estivo ordered an MRI of the right and left shoulders that revealed some slight tendinitis to both his rotator cuffs. There were no tears or abnormalities. His treatment of claimant consisted of anti-inflammatory medications and physical therapy, as well as temporary work restrictions of avoiding overhead work with both of his upper extremities. Dr. Estivo released claimant from treatment on November 9, 2001. During his treatment of claimant, Dr. Estivo diagnosed him with a cervical spine strain and bilateral shoulder strains. No surgery was required. When claimant was released from treatment, Dr. Estivo imposed permanent restrictions of limited overhead work for both arms.

Dr. Estivo testified that based on the AMA *Guides*,[7] he would not assign any impairment for claimant for the problems he presented in 2001. His report of May 9, 2001,

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

states: "I feel that he has incurred a one per cent (1%) impairment to each shoulder,"[8] but does not mention the AMA *Guides*.

Dr. Estivo reviewed the task list prepared by Steve Benjamin. Of the 13 tasks, claimant is unable to perform 2 for a task loss of 15 percent. Claimant would be unable to perform No. 11, assembling and building crates because it was 8 hours and constant, and No. 12, installing foam nesting, materials and fixtures into crates, because it was four hours and frequent and because it required him to work overhead.

Dr. Estivo reviewed the task list prepared by Jerry Hardin. He opined that claimant would be able to perform all 12 of the tasks on that task list because no overhead work was set out.

Dr. Mark Melhorn, a board certified orthopedic surgeon with a specialty in hands and upper extremities, initially treated claimant on November 22, 2002. Claimant was complaining of painful right and left upper extremities, including his shoulders and his neck. Dr. Melhorn treated claimant and released him from care on June 19, 2003. His primary working diagnosis was right de Quervain's and right carpal tunnel syndrome. Dr. Melhorn performed right carpal tunnel release and right de Quervain's release on claimant. He did not perform any surgery on claimant's left upper extremity. When claimant was released from treatment, he had no physical restrictions. He was released to regular work similar to that he was performing at the time he was last seen. Dr. Melhorn found that claimant suffered a 5.3 percent permanent partial impairment to his right forearm based on the AMA *Guides*.

After claimant was released from treatment on June 19, 2003, he subsequently returned to Dr. Melhorn on December 18, 2003, complaining of his right thumb locking and popping. He also complained of left thumb pain and symptoms on the left consistent with left carpal tunnel syndrome. Dr. Melhorn treated claimant with education, heat and cool modalities, medication, and modification of activities. Dr. Melhorn last saw claimant on April 1, 2004. At that time, he noted a nerve conduction test revealed that claimant had symptoms of left carpal tunnel syndrome and was a reasonable candidate for surgery. With regard to claimant's cervical spine, other than age-related changes, Dr. Melhorn was unable to find any other abnormalities. With regard to the shoulders, an MRI showed that claimant had AC arthritis that appeared to be age related and which was unlikely to benefit from surgical intervention. Although he recommended that claimant rotate tasks, he did not place any specific work restrictions on claimant.

Dr. Melhorn did not find that claimant suffered any additional impairment of function to his right upper extremity since he had previously rated him. He felt that claimant may

---

[8] Estivo Depo., Ex.2 at 8.

have had some functional impairment to his left upper extremity, but since claimant elected to have no additional treatment, he did not fit within the AMA *Guides* for providing a permanent functional impairment. Dr. Melhorn recommended that claimant have left carpal tunnel release. If claimant had consented to the surgery, Dr. Melhorn believes his impairment on the left would be similar to the 5.3 percent impairment for his right upper extremity.

Dr. Melhorn reviewed a task list showing 13 tasks prepared by Steve Benjamin. He opined that claimant is unable to perform 1 task out of the 13 tasks listed, for a task loss of 8 percent. Dr. Melhorn reviewed the task list prepared by Jerry Hardin. He found that claimant was unable to perform one task out of the 12 tasks, for a task loss of 8 percent.

Dr. Pedro Murati, a certified independent medical examiner who is also board certified in rehabilitation and physical medicine and electrodiagnostic medicine, evaluated claimant on February 28, 2005, at the request of claimant's attorney. Claimant reported a date of accident of May 3, 2000, and said he was lifting 50 pound angle iron when he felt neck pain. Claimant complained that he had neck pain and cracking, with headaches that start in the base of his skull. He also complained of upper back pain and pain in his shoulders, as well as left hand weakness.

Dr. Murati diagnosed claimant with post right carpal tunnel release, myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical and thoracic paraspinals, and left carpal tunnel syndrome. He opined that claimant's current diagnoses are a direct result of the work-related injuries that occurred on May 3, 2000, and each and every day thereafter and October 1, 2002, and each and every day thereafter.

Based on the AMA *Guides*, Dr. Murati placed claimant in cervicothoracic DRE Category II with a 5 percent whole person impairment for the myofascial pain syndrome affecting claimant's cervical spine. For the myofascial pain syndrome affecting the thoracic spine, he placed claimant in thoracolumbar DRE Category II with a 5 percent whole person impairment. He found claimant had a 10 percent permanent partial impairment of the right upper extremity for his post right carpal tunnel release, which converted to a 6 percent whole person impairment. For the left carpal tunnel syndrome, he rated claimant as having a 10 percent permanent partial impairment of the left upper extremity, which converted to a 6 percent whole person impairment. Using the Combined Values Chart, Dr. Murati rated claimant as having a 20 percent permanent partial impairment of the whole person.

Dr. Murati recommended that claimant have restrictions including no climbing ladders, no crawling, no working above shoulder level, no reaching more than 24 inches away from his body with both arms. Claimant should avoid awkward positions of the neck, not use hooks, knives, or vibratory tools with either hand, and no lifting, carrying, pushing or pulling greater than 50 pounds occasionally or 35 pound frequently.

Dr. Murati reviewed the task list prepared by Jerry Hardin and of the 12 tasks on the list, claimant is unable to perform 8 for a task loss of 67 percent.

Dr. Philip Mills, who specializes in physical medicine and rehabilitation, examined claimant on May 12, 2005, at the request of the ALJ. He had previously treated and evaluated claimant at the request of respondent.

Dr. Mills first evaluated claimant for injuries in his current cases on October 29, 2003. After that examination, he determined that claimant was in need of additional treatment and recommended a vigorous course of outpatient physical therapy, which he hoped would cut down on claimant's headaches. Along with headaches, claimant presented with complaints regarding his neck, shoulders, right elbow and hand. Dr. Mills again saw claimant on December 4, 2003. At that time he again examined claimant and diagnosed claimant with myofascial pain syndrome, left carpal tunnel syndrome, status post carpal tunnel release on the right, and trigger thumb on the right hand. He did not impose any restrictions on claimant. Claimant was again seen on January 6, 2004, at which time Dr. Mills recommended that claimant complete four treatments of physical therapy. Dr. Mills released claimant from treatment at that time. He did not see claimant again until May 12, 2005, when Dr. Mills examined him at the request of the ALJ.

On May 12, 2005, Dr. Mills found claimant to be at maximum medical improvement. Based on the AMA *Guides*, he opined that claimant had a 10 percent permanent partial impairment to the right upper extremity for carpal tunnel syndrome status post release, which converts to a 6 percent whole body impairment. He also rated claimant as having 5 percent permanent partial impairment to the body as a whole using the DRE cervicothoracic Category II for his impairment to the neck. Using the Combined Values Chart, he rated claimant as having an 11 percent whole body impairment. The 5 percent permanent partial impairment to the body for the neck he related to claimant's accident of May 2000.

For claimant's carpal tunnel conditions, Dr. Mills recommended he avoid crimping and non-ergometric vibratory equipment and to rotate tasks. He did not impose any restrictions related to claimant's cervical condition.

Dr. Mills reviewed a task list prepared by Steve Benjamin. Because of the carpal tunnel condition, he opined that claimant would be unable to perform 4 of the 13 tasks listed, which computes to a task loss rating of 31 percent. Dr. Mills also reviewed the task list prepared by Jerry Hardin. He opined that because of claimant's carpal tunnel, he would not be able to perform 4 of the 12 tasks, for a task loss of 33 percent.

Jerry Hardin, a human resource consultant, met with claimant on July 24, 2006, at the request of his attorney. Together with claimant, Mr. Hardin prepared a list of 12 tasks performed by claimant during the 15-year period before his injuries.

Claimant told Mr. Hardin that he had graduated from high school. He had no further formal education but only on-the-job training. Claimant had worked for respondent since June 1, 1978, right after he graduated from high school. At the time Mr. Hardin met with claimant, claimant was not working. He indicated that he had been working a 40-hour week and made $1,110.40 per week as salary, not including any fringe benefits. In looking at the restrictions placed on claimant by Dr. Melhorn and Dr. Mills, Mr. Hardin opined that claimant could still earn $400 per week. In looking at the restrictions of Dr. Murati, he believed claimant could earn $320 per week.

It is Mr. Hardin's understanding that all of claimant's restrictions were imposed as a result of the October 1, 2002, injury. Dr. Melhorn's and Dr. Mills' restrictions are to the upper extremities for the carpal tunnel. Dr. Murati's report is concerning claimant's neck. The only permanent restrictions related to the May 3, 2000, accident are those of Dr. Murati.

Mr. Hardin does not recall that claimant mentioned whether he was looking for work at the time of the interview. Mr. Hardin did not discuss with him whether he was looking for work. Claimant told Mr. Hardin that at the time of his lay-off, he had been working a light-duty job.

Steve Benjamin, a vocational rehabilitation consultant, interviewed claimant on January 8, 2007, at the request of respondent. With information from claimant, he prepared a list of 13 nonduplicated tasks that claimant performed in the 15-year period before his injuries of October 1, 2002. Mr. Benjamin was familiar with the job at respondent through his past work with a union. Claimant was a shipping/distributor facilitator A, also known as a crater. Although claimant had a couple different job titles, they were basically crater jobs. The physical requirements of the job remained the same.

At the time Mr. Benjamin interviewed claimant, he was not employed and had a 100 percent wage loss. Mr. Benjamin opined that the most claimant might be able to earn would be $495.20, and the least amount was $370.40. The average of those two amounts was $447.68. This computes to a 56.6 percent wage loss using as a base wage claimant's earnings of $25.78 per hour for a 40-hour week. It does not take into consideration overtime or fringe benefits. Likewise, the wages that he averaged were based on an hourly rate.

PRINCIPLES OF LAW

Following creation of the bright line rule in the 1994 *Berry*[9] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries.[10] In *Treaster*,[11] the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's injury, as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[12]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

---

[9] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[10] Effective July 1, 2005, the Kansas Legislature amended K.S.A. 44-508(d) to create a new bright line rule for determining the date of accident "in cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas."

[11] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[12] *Treaster* at Syl. ¶ 3.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[13]

The Kansas appellate courts have given little consequence to the extent the determination of this date of accident may result in certain inequities when ascribing liability between successive/multiple insurance carriers of a single employer/respondent.

> We fail to see why the rule laid down in *Berry* should not be applied equally in a case where the dispute is over coverage between two insurance companies. The actual date of injury is very difficult to pinpoint in these cases, but the last day of work is not. This case is controlled by *Berry*.[14]

The Board concludes that claimant suffered additional aggravation to his upper extremities when he returned to the same job he had performed before his various treatments and surgery. Because claimant continued to aggravate his condition after each surgery, the last day worked rule is applicable.[15] The Board further determines that each insurance carrier is responsible for payment of the benefits incurred during its period of coverage such as medical expenses or temporary total disability compensation benefits.[16]

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[17] The existence, nature and extent of the disability of an injured workman is a question of fact.[18] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's

---

[13] *Treaster*, Syl. ¶ 4.

[14] *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 222, 960 P.2d 768 (1998).

[15] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[16] *Id.* at Syl. ¶ 9.

[17] K.S.A. 2007 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, Syl. ¶ 1, 826 P.2d 520 (1991).

[18] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, Syl. ¶ 2, 907 P.2d 923 (1995).

physical condition.[19] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[20]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[21]

K.S.A. 44-510d states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
>
> . . . .
>
> (11) For the loss of a hand, 150 weeks.
>
> (12) For the loss of a forearm, 200 weeks.
>
> (13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.
>
> . . . .
>
> (18) Amputation or severance below the wrist shall be considered as the loss of a hand. Amputation at the wrist and below the elbow shall be considered as the loss of the forearm. Amputation at or above the elbow shall be considered loss of the arm. . . .

---

[19] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 2, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[20] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[21] See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Casco*,[22] the Kansas Supreme Court stated:

> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.
>
> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.

ANALYSIS AND CONCLUSION

Following the Board's order of remand, the parties presented no additional evidence. A hearing was held before the ALJ on October 22, 2007, at which time counsel for the parties answered the court's questions, entered stipulations, and clarified the

[22] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 9, 10, 154 P.3d 494 (2007).

issues. The ALJ addressed each docketed claim individually, and it was apparent at that hearing that the two docketed claims were being treated separately. Neither party nor the court suggested that those claims were to be combined into one claim or one series of accidents. Claimant did not file a brief to the Board in this appeal. However, during oral argument to the Board, claimant's counsel argued that the ALJ was correct to enter a single award that combined all of the accidents and injuries alleged in both docketed claims through claimant's last day of work for respondent.

The Board concludes that there should be separate awards entered for the injuries claimant suffered in each docketed claim. Claimant alleged separate injuries in Docket No. 1,017,841 from what he alleged in Docket No. 1,017,842. He also alleged different dates of accident in those two claims. Claimant never amended his claim to allege a single series of accidents. Therefore, the awards should be separate.

In Docket No. 1,017,841, claimant has proven he suffered personal injury by accident on May 3, 2000. As a direct result of that injury, claimant has a permanent impairment of 5 percent to his cervicothoracic spine based upon DRE Category II of the AMA *Guides*. Claimant has failed to prove that he has a task loss attributable to this injury. Moreover, claimant failed to prove that he has permanent restrictions for this injury. Therefore, he is not entitled to an award of work disability. Claimant returned to work for respondent without restrictions. He continued to perform his regular job duties without accommodations from the respondent until his lay-off in June 2005. He did not leave work due to his injury. Thereafter, claimant was given restrictions by Dr. Murati that pertained to the use of claimant's neck, upper back, shoulders, arms, wrists and hands. However, when Dr. Murati gave his task loss opinions, he utilized and applied all of the restrictions he had given claimant without distinguishing which tasks claimant lost the ability to perform solely as a result of the injuries claimant suffered in this docketed claim. Moreover, in this instance, the Board finds the diagnoses, ratings and restrictions opinions given by the treating physicians, Drs. Estivo and Mills, to be more credible than those of Dr. Murati. Accordingly, claimant's permanent partial disability award is limited to his percentage of functional impairment.

In Docket No. 1,017,842, claimant has proven he suffered personal injuries from a series of accidents and traumas to his bilateral upper extremities through his last day worked for respondent on June 16, 2005. Claimant did not leave work because of his injuries, and he is not permanently and totally disabled. As a direct result of his injuries, claimant has proven he sustained permanent functional impairment of 10 percent to his right forearm and 5 percent to his left forearm. Claimant had an abnormal EMG bilaterally. Dr. Melhorn diagnosed claimant with carpal tunnel syndrome bilaterally. He only performed surgery on claimant's right upper extremity but said he was willing to perform surgery on the left had claimant been willing to proceed in that manner. Had he done so, Dr. Melhorn would have likewise rated the left at 5 percent. Dr. Mills did not rate the left upper

extremity, but Dr. Murati rated it at 10 percent. Claimant has ongoing symptoms bilaterally, and the Board finds his impairment is to both forearms.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated November 29, 2007, is modified to find that in Docket No. 1,017,841, claimant sustained a 5 percent permanent partial impairment to the body as a whole. In Docket No. 1,017,842, claimant has sustained a 10 percent permanent partial impairment to his right forearm and a 5 percent permanent partial impairment to his left forearm.

DOCKET NO. 1,017,841

Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $383 per week or $7,947.25 for a 5 percent functional disability, making a total award of $7,947.25. As of March 20, 2008, there would be due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of $383 per week in the sum of $7,947.25 for a total due and owing of $7,947.25, which is ordered paid in one lump sum less amounts previously paid.

DOCKET NO. 1,017,842
Right Forearm

Claimant is entitled to 20 weeks of permanent partial disability compensation, at the rate of $449 per week, in the amount of $8,980.00 for a 10 percent loss of use of the right forearm, making a total award of $8,980.00.

Left Forearm

Claimant is entitled to 10 weeks of permanent partial disability compensation, at the rate of $449 per week, in the amount of $4,490 for a 5 percent loss of use of the left forearm, making a total award of $4,490.

IT IS SO ORDERED.

Dated this _____ day of March, 2008.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge